Supreme Court, U.S.
FILED
FEB 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

85-1421
No. 85-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

TERRAIN ENTERPRISES, INC.,
Petitioner,

v.

THE WESTERN CASUALTY AND SURETY COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PAUL SNOW *
SNOW & BRANTLEY
L-102 Capital Towers Bldg.
Jackson, Mississippi 39201
Telephone: (601) 969-1977

and

CHARLES KNAUSS
Suite 506
401 E. Capitol Street
Jackson, Mississippi 39201
Telephone: (601) 948-0079
Counsel for Petitioner

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

I. A CLIENT SHOULD NOT BE DEPRIVED OF DUE PROCESS OF LAW BY UNAUTHORIZED ACTIONS OF HIS ATTORNEY IN VIOLATION OF THE 5TH AMENDMENT.

II. CAN AN APPELLATE COURT EXTINGUISH A PERSON'S RIGHT TO A TRIAL BY JURY WHEN THERE IS A DISPUTE IN MATERIAL FACT QUESTIONS IN VIOLATION OF THE 7TH AMENDMENT.

III. A RETROSPECTIVE APPLICATION OF *BLUE CROSS/BLUE SHIELD OF MISSISSIPPI v. CAMPBELL*, 446 So.2d 833 (MISS. 1984) TO THE FACTS OF OUR CASE SHOULD NOT BE ALLOWED.

IV. THE COURT OF APPEALS DEPARTED SO FAR FROM THE ACCEPTED, USUAL AND STATUTORY COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
OPINION CITATION	1
JURISDICTIONAL STATEMENT	2
CONSTITUTIONAL PROVISIONS INVOLVED THE CONSTITUTION OF THE UNITED STATES: AMENDMENT V	2
AMENDMENT VII	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	3
I. A CLIENT SHOULD NOT BE DEPRIVED OF DUE PROCESS OF LAW BY UNAUTHORIZED ACTIONS OF HIS ATTORNEY IN VIOLATION OF THE 5TH AMENDMENT	3
II. CAN AN APPELLATE COURT EXTINGUISH A PERSON'S RIGHT TO A TRIAL BY JURY WHEN THERE IS A DISPUTE IN MATERIAL FACT QUESTIONS IN VIOLATION OF THE 7TH AMENDMENT	10
III. A RETROSPECTIVE APPLICATION OF *BLUE CROSS/BLUE SHIELD OF MISSISSIPPI v. CAMPBELL*, 446 So.2d 833 (MISS. 1984) TO THE FACTS OF OUR CASE SHOULD NOT BE ALLOWED	12
IV. THE COURT OF APPEALS DEPARTED SO FAR FROM THE ACCEPTED, USUAL AND STATUTORY COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION	12
CONCLUSION	13
APPENDIX	1a

TABLE OF AUTHORITIES

CASES Page

Aetna Life Insurance Co. v. *Lavoie*, (U.S.S.C. #84-1601) 12
Blue Cross/Blue Shield of Mississippi v. Campbell, 446 So.2d 833 (Miss. 1984) 12
Boeing Company v. Shipman, 411 F.2d 365 (5th Cir. 1969) 5
Byrd v. Blue Ridge Rural Electric Cooperative, Inc., 356 U.S. 525, 538, 539 (1958) 9
Erie R.R. v. Tompkins, 304 U.S. 64 (1938) 3
Gambrell v. Southern Moline Plow Co., 103 Miss. 824, 60 So. 1012 (1913) 4, 5
Hirsch Bros. & Co. v. R.E. Kennington Co., 124 So. 344 (Miss. 1929) 7
Lane v. Woodland Hills Baptist Church, 285 So.2d 901, 905 (Miss. 1973) 7
Lavender v. Kuhn, 327 U.S. 645 (1946) 9
Leon Michael Co. v. O'Connell-Myers Co., 115 Miss. 716, 76 So. 637,638 (1917) 6
N.M.S. Industries, Inc. v. Premium Corporation of America, 487 F.2d 292 (5th Cir. 1973) 4, 5
People of the State of Mississippi Ex Rel. Giles v. Thomas, 464 F.2d 156 (5th Cir. 1972) 8
Richards v. Allstate Insurance Company, 693 F.2d 502 (5th Cir. 1983) 12
Spearman v. Spearman, 471 So.2d 1204 (Miss. 1985) 7
U.S. v. Beebe, 180 U.S. 343, 351-52 (1901) 6
United States v. State of Texas, 523 F. Supp. 703 (E.D. Texas, 1981) 6
Western Casualty and Surety Company v. Terrain Enterprises, Inc., 774 F.2d 1320 (5th Cir. 1985) 1

UNITED STATES CONSTITUTION

United States Constitution, 5th Amendment 2
United States Constitution, 7th Amendment 2

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES

	Page
28 U.S.C. § 1254(1)	2
30 ALR 2d 944	6
66 ALR 107	6
O. W. HOLMES, *Agency*, COLLECTED LEGAL PAPERS, 49, 114-15 (1920)	9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-——

TERRAIN ENTERPRISES, INC.,
Petitioner,

v.

THE WESTERN CASUALTY AND SURETY COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

COMES NOW the Petitioner, Terrain Enterprises, Inc.,[1] a Mississippi corporation, and respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on the 29th day of October, 1985. In support of this Petition, Petitioner would show unto this Honorable Court the following:

OPINION CITATION

The Opinion of the United States Court of Appeals for the Fifth Circuit is attached hereto (A. 1a-5a) and is reported in the case styled and numbered: *Western Casualty and Surety Company v. Terrain Enterprises, Inc.*, 774 F.2d 1320 (5th Cir. 1985).

---

[1] Terrain is a closely held corporation. It has no parent corporation or subsidiaries.

JURISDICTIONAL STATEMENT

The Judgment and Opinion of the Court of Appeals for the Fifth Circuit was entered and filed on the 29th day of October, 1985. A timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied on November 25, 1985, (A. 6a-7a) and this Petition was filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

THE CONSTITUTION OF THE UNITED STATES:

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

The Petitioner, Terrain, filed its diversity action against the respondent, Western, in the Federal District Court for the Southern District of Mississippi. The complaint alleged that Western had committed a tortious

breach of a construction bond contract inuring to the benefit of Terrain. A few days prior to the initial trial setting, Terrain's former attorney, without Terrain's authority, telephoned Western's attorney and extended an offer to settle Terrain's claim for the sum of $65,000.00. Western allegedly accepted.

Western's Motion to Enforce Settlement Agreement was overruled by the district court. (A. 8a-9a). However, the district court granted Western leave to amend its answer to allege settlement as an affirmative defense. When the case was tried, the jury finding there was no settlement rejected this defense and awarded Terrain actual and punitive damages. The district court entered its final judgment for $283,830.00 actual damages together with pre-judgment interest of $88,932.00; and, punitive damages in the sum of $800,000.00. (A. 10a-11a). Western appealed.

The Court of Appeals reversed and remanded to the District Court with directions to enforce as a matter of law the settlement of $65,000.00. From this decision, Terrain prays issuance of a Writ of Certiorari to review the judgment of the Court of Appeals.

REASONS FOR GRANTING THE WRIT

I. A CLIENT SHOULD NOT BE DEPRIVED OF DUE PROCESS OF LAW BY UNAUTHORIZED ACTIONS OF HIS ATTORNEY IN VIOLATION OF THE 5TH AMENDMENT.

We are *Erie*-bound to apply Mississippi substantive law to this diversity case. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). Under Mississippi law, apparent authority of an attorney to settle the case on behalf of a client is a question of fact for the jury. Not only did the Fifth Circuit Court of Appeals fail to follow the applicable

Mississippi law,[2] they also failed to follow the Fifth Circuit Court of Appeals case applying Mississippi law,[3] in addition to ignoring the United States Supreme Court opinion applying the rule of law.[4]

The Fifth Circuit Court of Appeals reversed the case with directions to enforce the settlement offer between Terrain and Western, in essence, holding that apparent authority of an attorney to settle a case is a question of law and not a question of fact and concluded the litigation.

An attorney who attempts to settle his client's case without actual authority from his client does not bind the client as a matter of law even though a third person believes the attorney had apparent authority to settle the case. The client, if he acts within a reasonable time, should be allowed to produce facts before the jury concerning actual and apparent authority of the attorney to settle the case. When facts are in dispute concerning this issue, only a jury can resolve the case, not an appellate court.

To permit an attorney to settle a case without authority from his client and make it become final and conclusive on the client is thoroughly repugnant to all principals of due process of law and constitutes a clear taking of property without due process in that the client has no opportunity or notice to appear and be heard before a case is finally settled. If this practice is permitted to be made conclusive as a matter of law, instead of making it merely presumptively correct, then it would allow unscrupulous attorneys to deprive solvent persons or cor-

---

[2] *Gambrell v. Southern Moline Plow Co.*, 103 Miss. 824, 60 So. 1012 (1913).

[3] *N.M.S. Industries, Inc. v. Premium Corporation of America*, 487 F.2d 292 (5th Cir. 1973) (applying Mississippi law).

[4] *U.S. v. Beebe*, 180 U.S. 343, 351-52 (1901).

porations of their property without due process of law or without remedy.

In *Gambrell v. Southern Moline Plow Co.*, 103 Miss. 824, 60 So.1012 (1913), the Mississippi Supreme Court *reversed* the lower court's finding that an attorney had authority to settle a case for the client as a *matter of law* and remanded the case for a jury trial on that issue.

The Mississippi supreme court held as follows:

> "If the evidence introduced on behalf of appellate/defendant in the court below be true, he neither authorized, ratified, nor received any benefit from the agreement entered into by his attorneys in the bankruptcy proceeding with the attorneys representing appellee, upon which agreement this suit is predicated."

Id. at 1013.

This case clearly demonstrates that when an attorney does not have authority to settle a case on the client's behalf, then the jury should decide the issue of the attorney's authority to settle the case.

The Fifth Circuit opinion has the effect of always placing the attorney's representations of the facts on a plane above those of his client in that the client is afforded no opportunity to present the true situation to a jury. Why should an attorney's testimony that he had authority to settle the case be given any more weight than the client's testimony that the attorney had no authority to settle the case? The jury must decide this material fact dispute. In *N.M.S. Industries, Inc. v. Premium Corporation of America*, 487 F.2d 292 (5th Cir. 1973) (applying Mississippi law), the Fifth Circuit recognized the doctrine of apparent authority as a jury issue and affirmed a jury award wherein the question of apparent authority was submitted to the jury citing *Boeing Company v. Shipman*, 411 F.2d 365 (5th Cir. 1969). The decision of the Court of Appeals is contrary to pub-

lic policy in that it affords opportunities where unscrupulous attorneys may deprive their clients of property without due process of law or other remedy. Without question, if Terrain's former attorney had gone into the district court and dismissed its suit without any compensation being paid by Western, then the district court or any higher appellate court, would repudiate the conduct of the attorney and allow Terrain to reinstate its suit.

In the civil arena, attorneys have no implied authority to compromise or settle their client's claims or defenses. *U.S. v. Beebe*, 180 U.S. 343, 351-52 (1901). *Beebe* allows proof to be offered into evidence for the jury to decide whether the attorney had authority to settle the case. The Fifth Circuit Court of Appeals in taking this question from the jury and deciding it as a matter of law, totally contradicts the *Beebe* decision.[5]

The Fifth Amendment of the United States Constitution requires that a person be entitled to due process of law before his property is taken. To allow an attorney to end his client's case by settlement without authority, without a hearing, smacks in the face of this constitutional amendment and should not be allowed.

For another Mississippi case dealing with an attorney settling the case without authority, see *Leon Michael Co. v. O'Connell-Myers Co.*, 115 Miss. 716, 76 So. 637,638 (1917), whereby the Mississippi supreme court reversed and remanded the granting of a peremptory instruction for the defendant enforcing a settlement where the lawyers for each side settled the case after suit was filed holding there was not a meeting of the minds of the

---

[5] See also, *United States v. State of Texas*, 523 F.Supp. 703 (E.D. Texas, 1981) (An attorney's lack of authority to settle a civil case without his client's specific consent is one of the few recognized exceptions to the general rule that the actions of a lawyer in his capacity as legal agent irrevocably bind the client he represents.) and 30 ALR 2d 944 (authority of attorney to compromise action) and 66 ALR 107.

parties concerning the requirements of the settlement especially since the defendant did not attempt to carry out the agreement.

In *Spearman v. Spearman*, 471 So.2d 1204 (Miss. 1985), the Mississippi supreme court held that the divorce decree signed by Brett on behalf of Spearman was not valid and held as follows:

> "The evidence reveals that while attorney Brett was hired by the appellant to negotiate on his behalf, he was also discharged several weeks before the divorce hearing . . ."
>
> [2] These facts led us to the conclusion that appellant cannot be bound by the unauthorized consent of his attorney and the conclusion that no consent decree exist. We simply hold that under the facts of this case, *where a divorce decree and property settlement divest a party of title to real property, that consent decree should be signed and consented to in writing by the parties.* (Emphasis ours)

Id. at 1206.

Also see the case of *Lane v. Woodland Hills Baptist Church*, 285 So.2d 901,905 (Miss. 1973), whereby the Mississippi supreme court held the following:

> "While an attorney may bind his client by stipulation or admission of facts during the course of the trial, an attorney has no implied or apparent authority to bind his client by stipulation or admissions as to matters of law or legal conclusions. Neither his client nor the court is bound by such stipulations."

In *Hirsch Bros. & Co. v. R. E. Kennington Co.*, 124 So. 344 (Miss. 1929), the Mississippi supreme court offered the following words of wisdom:

> . . . To permit a judgment taken without authority of an attorney to represent the person and make it become final and conclusive on such person seems

> to be thoroughly repugnant to all principles of due process of law, and *it would be clearly a taking of property without due process of law, in that the party had no opportunity or notice to appear and be heard before the judgment was finally rendered against him* . . . If the practice were permitted to make the judgment conclusive instead of making it merely presumptively correct, it would lie within the power of unscrupulous persons to deprive solvent persons, or corporations, of their property without due process of law or without remedy . . . (Emphasis added)

124 So. at 350.

The Fifth Circuit Court of Appeals mistakenly changed the issue on appeal, from a specific issue which was disputed by fact, into a general issue which was not disputed by fact.

The Fifth Circuit mistakenly made the general issue a question of law on undisputed facts. By mistakenly changing the issue from apparent authority "to settle the case" to apparent authority "to act," the result is that the well-settled law in Mississippi, that apparent authority of an attorney to settle a case is a jury question, was not applied.

The specific issue is whether a jury should determine the apparent authority of an attorney to settle a case for a client when there are material fact questions in dispute. The facts and evidence in the case at bar prove without a doubt that there were factual questions in dispute for the jury to decide.

Because there were material facts in dispute concerning the real issue of apparent authority to settle for $65,000.00, the jury was the one to properly decide this issue. *People of the State of Mississippi Ex Rel. Giles v. Thomas*, 464 F.2d 156 (5th Cir. 1972) (whether $9 exchanged with receipt constituted a full settlement was a jury issue), citing *Boeing v. Shipman, supra.*

The jury properly decided this issue in favor of Terrain and now the Fifth Circuit attempts to inject their own personal opinion into the case, a privilege they do not have. *Lavender v. Kurn, infra.* This matter is controlled by Federal law and the Appellate Court simply does not decide the facts in a Federal District Court. *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525, 538, 539 (1958).

Terrain, with all due respect, submits that the Court of Appeals based its decision upon an antiquated doctrine of agency law based upon legal fictions which Justice Holmes concluded were the vestiges of very ancient traditions. O. W. HOLMES, *Agency*, COLLECTED LEGAL PAPERS, 49, 114-15 (1920). Terrain respectfully urges this court that application of a mechanical and antiquated doctrine of law is very likely to result in future harm to many of those who are called upon to select their lawyers to handle proceedings in the courts of Mississippi and perhaps beyond that state's jurisdiction if the opinion rendered below is utilized as authority.

In summary, when there are material fact questions in dispute concerning the attorney's apparent authority to settle the case for the client, the alleged settlement of the case is not binding on the client as a matter of law. To hold otherwise would deprive the client of his property without due process of law, and violates the United States Constitution, 5th Amendment.

There could be nothing worse than taking someone's property and not allowing him to have his day in Court. This violates the Constitutional Amendments V and VII. Apparent authority of an attorney to settle a case on behalf of a client must be decided by the jury when there are material fact questions in dispute concerning this specific issue.

The district court and jury reached their judgment by using the traditional tools historically available under

the law and the United States Constitution. This court should not allow the Fifth Circuit Court of Appeals to do no less.

The granting of the writ requested herein would allow this Honorable Court an opportunity to promote the public interest as it pertains to attorney/client relationships.

II. CAN AN APPELLATE COURT EXTINGUISH A PERSON'S RIGHT TO A TRIAL BY JURY WHEN THERE IS A DISPUTE IN MATERIAL FACT QUESTIONS IN VIOLATION OF THE 7TH AMENDMENT.

There was substantial evidence, both direct and circumstantial, to support the jury's decision in favor of Terrain on the issue of the apparent authority of the attorney Mockbee to settle the case and the opinion of the Fifth Circuit Court of Appeals should not be substituted over that of the jury.

The following facts justify substantial evidence, both direct and circumstantial, to support the jury's decision in favor of Terrain on the issue of apparent authority of attorney Mockbee to settle the case for a mere $65,000.00: (1) Terrain did not have the contract completed until March of 1982, instead of the fall of 1979. (2) Terrain was forced to complete the job as soon and as cheaply as possible. (3) Terrain had to borrow money to complete the project. (4) Terrain was not able to sell their lots until the project was completed. (5) Terrain had to pay additional interest on the money borrowed in which to complete the project. (6) Terrain had a leaking sewer system which the new contractor would not touch. (7) Terrain had to pay additional engineering costs. (8) Terrain had to pay $12,000.00 additional expense for attorney's fees. (9) Terrain was insulted by the offer of $50,000.00 on August 13, 1980. (10) Terrain refused to even talk with Western after the $50,000.00 offer was refused. (11) Terrain refused to accept $50,000.00 after

the job was completed by Terrain's subsequent contractor. (12) Terrain did not get the subdivision it originally bargained for. (13) Terrain testified that attorney David Mockbee had no authority to settle the case for $65,000.00. (14) *Attorney David Mockbee notified Western within two days of the alleged settlement that he had no authority to settle the case.* (15) Terrain fired attorney David Mockbee immediately upon discovery of the unauthorized actions of attorney David Mockbee. (16) the jury could have inferred that the offer to settle the case for $65,000.00 was inadequate in and of itself. (17) the jury could have believed that Terrain was not going to settle the case for any amount whatsoever after listening to the testimony of how Western handled this claim and treated Terrain during the meeting of August 13, 1980, and thereafter. This is especially true since Terrain testified that it was insulted by the offer of $50,000.00 on August 13, 1980.

A litigant in federal court is entitled to a trial by jury of disputed fact questions under the *Boeing v. Shipman*, 422 F.2d 365 (5th Cir. 1969) standard and the 7th Amendment.

To allow the Fifth Circuit Court of Appeals to substitute its opinion in place of that of the jury contradicts the holding of *Lavender v. Kuhn*, 327 U.S. 645 (1946), which held:

> "Only when there is a complete absence of probative facts to support the conclusions reached, does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the Appellate Court's function is exhausted and the evidentiary basis becomes apparent, it being immaterial that the Court might draw a contrary inference or feel that another conclusion is more reasonable."

Id. at 652,53.

All of the facts and reasonable inferences therefrom were considered by the jury to dispute the facts of apparent authority of attorney Mockbee to settle the case for $65,000.00.

III. A RETROSPECTIVE APPLICATION OF *BLUE CROSS/BLUE SHIELD OF MISSISSIPPI v. CAMPBELL*, 466 So.2d 833 (MISS. 1984) TO THE FACTS OF OUR CASE SHOULD NOT BE ALLOWED.

The case at bar was tried during the week of July 12, 1984. *Campbell* was decided on December 19, 1984, and rehearing was denied on April 10, 1984. The Fifth Circuit erroneously applied the holding in *Campbell* against Terrain.

The Court does not decide facts in a jury trial in Federal Court. When an insurance company fails to pay a legitimate claim and uses excuses that are not in the policy of insurance, then the jury has a right to decide whether that insurance company is liable for bad faith. *Richards v. Allstate Insurance Company*, 693 F.2d 502 (5th Cir. 1983).

The right to a trial by jury and due process of law should not be extinguished on appeal. The issue of the bad faith actions of Western were properly submitted to the jury and the Fifth Circuit's retrospective application of *Campbell* should not be allowed. Also see, *Aetna Life Insurance Co. v. Lavoie* (U.S.S.C. #84-1601), presently on appeal.

IV. THE COURT OF APPEALS DEPARTED SO FAR FROM THE ACCEPTED, USUAL AND STATUTORY COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

Because of the arguments stated in I, II, and III, Terrain respectfully requests this Honorable Court to supervise the actions of the Court of Appeals in this case to

prevent a grave injustice to a large group of citizens and prevent a patent violation of the United States Constitution.

CONCLUSION

For the foregoing reasons, Petitioner prays for the issuance of a Writ of Certiorari to review the judgment rendered in the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

PAUL SNOW *
SNOW & BRANTLEY
L-102 Capital Towers Bldg.
Jackson, Mississippi 39201
Telephone: (601) 969-1977

and

CHARLES KNAUSS
Suite 506
401 E. Capitol Street
Jackson, Mississippi 39201
Telephone: (601) 948-0079
Counsel for Petitioner

* Counsel of Record

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 84-4615

TERRAIN ENTERPRISES, INC.,
Plaintiff-Appellee,

v.

THE WESTERN CASUALTY AND SURETY COMPANY,
Defendant-Appellant.

Oct. 29, 1985

Appeal from the United States District Court
for the Southern District of Mississippi

Before CLARK, Chief Judge, POLITZ and JONES, Circuit Judges.

OPINION

CLARK, Chief Judge.

The Western Casualty and Surety Company appeals a jury verdict against them in a tortious breach of contract suit brought by Terrain Enterprises, Inc. We reverse.

Terrain entered into a contract with U-Con on April 4, 1979. U-Con was to prepare street and sewer connec-

tions for a subdivision being developed by Terrain. Western was the surety on the project. U-Con defaulted on its contract with Terrain in early 1980. Western was not informed of this default until July 1980.

Upon notification Western hired an adjustor and an engineer to determine what completion costs would be. This job was made more difficult because the job site had been ignored for the six months between U-Con's default and Western's notification and the engineer could not readily determine the extent of U-Con's underground work. Based on the information acquired, Western made a settlement offer of $50,000, which combined with the amount remaining in the contract, would have provided $198,327.90 to complete the project.

Terrain rejected this offer and hired Mid-South Constructors to complete the job at a cost of $196,596.50. Terrain's excess costs were $48,677.46. Western repeated its settlement offer after Terrain entered the contract with Mid-South, which offer was rejected. Instead, Terrain sued Western for tortious breach of contract.

Two weeks before the earliest trial date, however, David Mockbee, Terrain's attorney, made a $65,000 settlement offer to Western's attorney, which offer was accepted by Western. Terrain subsequently disavowed the offer as unauthorized. Western made a motion to enforce the settlement on October 14, 1983. The trial court expressly recognized that a settlement offer was made by Terrain's attorney and accepted by Western's attorney but denied the motion. (Order of October 17, 1983). He found a genuine misunderstanding between Terrain and Terrain's attorney regarding the attorney's authority to settle the case.

The jury returned a verdict against Western for $283,830 compensatory damages and $800,000 punitive damages. The trial judge awarded prejudgment interest in the amount of $88,932.00. Western appeals the verdict

as excessive, against the evidence, the subject of passion and prejudice and rendered in accordance with improper instructions.

As a matter of law, based on uncontradicted evidence, there was an offer of settlement by counsel for Terrain and an acceptance by counsel for Western. Where the parties, acting in good faith, settle a controversy, the courts will enforce the compromise without regard to what the result might have been had the parties chosen to litigate. *Hennessy v. Bacon*, 137 U.S. 78, 11 S.Ct. 17, 4 L.Ed. 605 (1890). Mississippi law also looks with favor upon compromise and settlement of litigation. *State v. Stockett*, 249 So.2d 388 (Miss. 1971); *Parker v. Howarth*, 340 So.2d 434 (Miss.1976) (the compromise of doubtful claims is favored); *McCorkle v. Hughes*, 244 So.2d 386 (Miss.1971) (where there is no fraud and the parties meet on equal terms and adjust their differences, the court will not overlook the compromise, but will hold the parties concluded by the settlement).

Notwithstanding the law regarding settlement, Terrain contends that their counsel, David Mockbee, did not have actual or apparent authority to settle the case for $65,000. Western countered that contention with Mockbee's testimony that he was "directed" to settle the case. Because in a diversity suit, state law controls whether a contract of settlement was made and whether it should be enforced, *Glazer v. J.C. Bradford & Co.*, 616 F.2d 167 (5th Cir.1980), we will look to Mississippi law to resolve the matter.

Mississippi follows the common law rule except where changed by statute. *Tuggle v. Williamson*, 450 So.2d 93 (Miss. 1984). In this instance there is no statute changing the doctrine of apparent authority which is recognized by Mississippi law. *NMS Industries v. Premium Corp. of America*, 487 F.2d 292 (5th Cir.1973). An act is considered to be within the agent's apparent author-

ity when a third party is justified in concluding that the agent is authorized to perform it from the nature of the duties which are entrusted to him. *McPherson v. McLendon*, 221 So.2d 75, 78 (1969). Apparent authority is to be determined from the acts of the principal and requires reliance and good faith on the part of the third party. *Tarver v. J.W. Sanders Cotton Mill*, 187 Miss. 111, 192 So. 17 (1939).

As both parties point out, Terrain's actions are dispositive of the question of apparent authority in this situation. Terrain hired Mockbee as counsel and from that point until the termination of his services, he handled the case. Testimony showed that he attended and took depositions, corresponded with counsel for Western, conducted discovery and participated in all pretrial conferences and orders.

It is presumed that an attorney who has represented a party is authorized to take all action necessary to conduct the litigation. *Great Atlantic and Pacific Tea Co. v. Majure*, 176 Miss. 356, 168 So. 468 (1936). The burden of showing that the attorney had no authority to act is upon the party denying such authority. *Hirsch Bros. & Co. v. R.E. Kennington Co.*, 155 Miss. 242, 124 So. 344 (1929). Terrain did not meet this burden because they did not offer any proof that Mockbee did not have authority to act on their behalf. Western was justified in relying upon the settlement offer made by Mockbee based upon his previous actions as representative of Terrain. There is no question here of good faith. Thus, the three requirements of apparent authority were satisfied in this instance.[1]

---

[1] The factual and legal issues raised on appeal are now irrelevant because the case was resolved on the settlement issue. Terrain, however, suggests that even if the court enforces the settlement, the issue of bad faith remains and the punitive damages award could and should be affirmed. Not only is this argument without merit, but the instruction on bad faith should not have been given under

The judgment appealed from is reversed and the case is remanded to the district court with directions to enforce the settlement offer between Terrain and Western.

REVERSED and REMANDED.

---

the facts of this case. *Blue Cross & Blue Shield of Miss. v. Campbell*, 466 So.2d 833 (Miss. 1984).

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-4615

TERRAIN ENTERPRISES, INC.,
Plaintiff-Appellee,
versus

THE WESTERN CASUALTY AND SURETY COMPANY,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Mississippi

ON PETTION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion JULY 8, 5 Cir., 1985, —— F.2d ——)

(November 25, 1985)

Before CLARK, Chief Judge, POLITZ and JONES, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the

members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action File No. J81-0364(R)

TERRAIN ENTERPRISES, INC.,
Plaintiff,

vs.

THE WESTERN CASUALTY & SURETY COMPANY,
Defendant.

[Filed Oct. 17, 1983]

ORDER

There came on for hearing on October 14, 1983, the motions of The Western Casualty & Surety Company to enforce settlement and for leave to amend its Answer and the motions of Terrain Enterprises, Inc. for substitution of counsel and for continuance, and the Court, being fully advised of the premises, having considered the motions and supporting affidavits, and having heard argument of counsel, is of the opinion that the following dispositions be made:

IT IS ORDERED AND ADJUDGED that the Motion for Enforcement of Settlement filed by The Western Casualty & Surety Company be overruled, even though a settlement was offered by Plaintiff's attorney and accepted by Defendant's attorney, for the reason that there was a genuine misunderstanding between the Plaintiff and Plaintiff's counsel as to the authority of Plaintiff's counsel to settle this case for the amount agreed; and

IT IS ORDERED AND ADJUDGED that The Western Casualty & Surety Company be granted leave to amend its Answer to add additional affirmative defenses in the form attached hereto as Exhibit "A"; and

IT IS ORDERED AND ADJUDGED that Plaintiff be permitted to substitute counsel, that David W. Mockbee and the firm Jones, Mockbee & Bass, P.A., is hereby permitted to withdraw as attorney of record for the Plaintiff, Terrain Enterprises, Inc., and that the firm of Gilmer & Jones, P.A., is hereby entered as attorneys of record for the Plaintiff; and

IT IS ORDERED AND ADJUDGED that this case be passed to the end of the Civil Jury Calendar, which commences October 17, 1983.

SO ORDERED this the 17 day of October, 1983.

/s/ Harold Cox
WILLIAM HAROLD COX
United States District Judge

Agreed as to Form:

TERRAIN ENTERPRISES, INC.
Plaintiff

By: /s/ [Illegible]
Its Attorney

THE WESTERN CASUALTY & SURETY COMPANY
Defendant

By: /s/ William R. Purdy
Its Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. J81-0364(L)

TERRAIN ENTERPRISES, INC.,
Plaintiff

v.

THE WESTERN CASUALTY AND SURETY COMPANY,
Defendant

[Filed July 20, 1984]

FINAL JUDGMENT

This cause having come on to be heard, there came the plaintiff and its attorneys, and the defendant and its attorneys, and a jury composed of Robert A. Ewer and eleven others, having been regularly impaneled and accepted by the parties and sworn according to law to try the issues, and the jury having heard the testimony of witnesses and all of the evidence, oral and documentary, introduced at the trial of this cause, and the instructions of the Court and argument of counsel in open Court, retired to consider their verdict and presently returned into Court their verdict which was examined by the Court and read by the Clerk, and was in words and figures as follows, to-wit:

> "We, the jury, find for the plaintiff, Terrain Enterprises, Inc., against the defendant, The Western Casualty and Surety Company, and assess its damages at $283,830.00 as compensatory damages."

"We, the jury, find for the plaintiff, Terrain Enterprises, Inc., against the defendant, The Western Casualty and Surety Company, and assess punitive damages in the amount of $800,000.00."

IT IS ORDERED AND ADJUDGED that the plaintiff, Terrain Enterprises, Inc., do have and recover from the defendant, The Western Casualty and Surety Company, the sum of $88,932.00 as interest from August 13, 1980, until July 19, 1984.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the plaintiff, Terrain Enterprises, Inc., do have and recover the sum of $283,830.00 as compensatory damages; $800,000.00 as punitive damages, and $88,932.00 as interest from August 13, 1980, until July 19, 1984, for a total sum of $1,172,762.00 together with interest thereon at the rate of eight percent per annum from and after the date hereof until paid, of and from the defendant, The Western Casualty and Surety Company.

IT IS FURTHER ORDERED AND ADJUDGED that all costs herein be, and they hereby are, assessed against the defendant, The Western Casualty & Surety Company.

FOR ALL OF WHICH LET EXECUTION ISSUE.

SO ORDERED AND ADJUDGED, this the 20 day of July, 1984.

/s/ Harold Cox
United States District Judge

Supreme Court, U.S.
FILED
MAR 27 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1421

In The

Supreme Court of the United States

October Term, 1985

TERRAIN ENTERPRISES, INC.,

Petitioner,

vs.

THE WESTERN CASUALTY & SURETY COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

*Luther S. Ott
William A. Weinischke
Robert C. Williamson, Jr.
1100 Peoples Bank Building
Post Office Drawer 1079
Jackson, Mississippi 39215-1079
(601) 969-4140
Counsel for Respondent

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

No. 85-1421

In The

Supreme Court of the United States

October Term, 1985

TERRAIN ENTERPRISES, INC.,

Petitioner,

vs.

THE WESTERN CASUALTY & SURETY COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent respectfully requests that this Court deny the petition for writ of certiorari.

CASE HISTORY

The present action is a diversity case, in which petitioner alleged that the respondent, The Western Casualty & Surety Company, tortiously breached a performance bond issued in connection with a construction project. Prior to trial, the dispute between the petitioner and respondent was settled by petitioner's former counsel for $65,000. The United States Court of Appeals for the Fifth Circuit, in an opinion written by Chief Judge Charles Clark of Mississippi, applying Mississippi law on apparent authority and settlement, reversed the District Court's finding that the settlement agreement was not binding and remanded the case to the District Court with instructions to enforce the settlement. The Court of Appeals also noted that petitioner's excess costs, the proper measure of petitioner's actual damages, were only $48,677.46 and that punitive damages were not recoverable on the facts of the case under Mississippi law. Had the Court of Appeals not enforced the settlement, petitioner's recovery would have been limited to $48,672.46 rather than $65,000.00.

———o———

CERTIORARI SHOULD NOT BE GRANTED UNDER RULE 17

The only reviewable issue presented in this diversity case is whether the Court of Appeals misapplied Mississippi law governing settlements. The decision of the Court of Appeals does not:

(1) conflict with a decision of another court of appeals,

(2) conflict with a decision of this Court,

(3) depart from the accepted and usual course of judicial proceedings,

(4) present an important question of federal law.

The opinion of the Court of Appeals was based upon factual evidence unique to this case and the proper application of Mississippi law.

Accordingly, certiorari is inappropriate under Rule 17 and should not be granted.

Respectfully submitted,

LUTHER S. OTT
WILLIAM A. WEINISCHKE
ROBERT C. WILLIAMSON, JR.
Counsel for Respondent The Western Casualty and Surety Company

OF COUNSEL:
OTT & PURDY, LTD.
1100 Peoples Bank Building
Post Office Drawer 1079
Jackson, Mississippi 39215-1079
(601) 969-4140